

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT ZELLMAN and CARL MASON,

Plaintiffs-Appellants,

v

ALEXANDER J. BRUHOWZKI and GLORIA
BRUHOWZKI,

Defendants-Appellees.

UNPUBLISHED
February 28, 2012

No. 300503
Wayne Circuit Court
LC No. 10-004217-CK

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this dispute involving the ownership of a business, plaintiffs Scott Zellman and Carl Mason appeal by right the circuit court's order granting defendants Alexander J. Bruhowzki and Glory Bruhowzki summary disposition under MCR 2.116(C)(7). Because we conclude that the trial court properly granted summary disposition, we affirm.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred "because of release, payment . . . or other disposition of the claim before commencement of the action."

The trial court properly concluded that plaintiffs' claims were precluded because they were based on a 2004 agreement, which was superseded by a subsequent operating agreement where the parties agreed that the new agreement "supersedes any and all other agreements, either oral or written, between the parties with respect to the subject matter." See *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 412-414; 646 NW2d 170 (2002). When understood in context, it is clear that both agreements addressed plaintiffs' membership interests. The operating agreement does not expressly refer to the acquisition of membership interest; it merely requires a capital contribution and states a level of ownership. But a fundamental part of plaintiffs' complaint is that they "were each required to pay \$225,000 more for their Member interests than provided in the [2004] Agreement." By their allegations, plaintiffs recognize the connection between the payment they agreed to make in the operating agreement and their stated membership interests. Thus, like the 2004 agreement, the operating agreement addressed the requirements for plaintiffs' membership interests. Consequently, the 2005 operating agreement superseded the 2004 agreement to the extent that it concerned that same subject matter.

Plaintiffs' arguments concerning waiver are inapposite. Although the trial court referred to waiver, it did not determine that plaintiffs' claims were barred by waiver. Instead, it correctly determined that plaintiffs' claims premised on the 2004 agreement were nullified by the integration clause in the 2005 operating agreement. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006).

Plaintiffs also contend that the absence of Gloria Bruhowzki's signature on the operating agreement is legally significant. Because plaintiffs did not raise this point in response to defendants' motion, the argument is not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). Contrary to plaintiffs' contention, the facts necessary for this Court to consider the issue have not been presented. Although the absence of her signature is apparent from the document, the record does not indicate, for example, whether she authorized Alexander Bruhowzki to sign on behalf of the owners of the business. Plaintiffs' failure to raise this issue below precludes consideration on appeal.

There were no errors warranting relief.

Affirmed. As the prevailing parties, defendants may tax their costs. MCR 7.219(A).

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly